In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-554

ALPINE INVESTMENTS, INC.,
Petitioner
v.
VETA PEARL BARTON and SUN OIL COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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October, 1979

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The petitioner respectfully prays that a writ of certiorari issue to review a judgment and opinion of the Supreme Court of Oklahoma entered in this proceeding on May 22, 1979.

OPINION BELOW

The opinion of the Supreme Court of Oklahoma is reported at 569 P.2d 532. A copy appears in the appendix hereto, along with the order of July 9, 1979 denying a timely petition for rehearing.

JURISDICTION

The judgment of the Supreme Court of Oklahoma was entered May 22, 1979. A timely petition for rehearing was denied July 9, 1979, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. In a suit for reformation of a deed, is mere publication notice constitutionally sufficient to support default judgment when the face of the deed being reformed contained information necessary to locate a defendant and give him actual notice?

2. If constitutionally inadequate notice denies a litigant opportunity to be heard, may a state accord finality to a judgment by using a procedural rule that turns upon the silence of the party denied adequate notice?

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of Amendment XIV of the Constitution of the United States provides in part:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In 1926, the Taylors (Taylors) conveyed all mineral interest in

their property to Union Royalty Company (Union). (Ex. 2) In 1947, default judgment was obtained against Union reforming the 1926 conveyance from an absolute alienation to a twenty (20) year term. (Ex. 14) Service of process to obtain the default judgment was by publication which was authorized by an affidavit stating there was no knowledge of Union's whereabouts. (Ex. 14) However, the very deed reformed, recorded in the county where the action was brought, had upon its face Union's address. In part, the deed said:

> "This indenture, made and entered into this 4th day of December, 1926, by and between Stone Taylor and Maud Taylor, his wife, Norman, Oklahoma, as party of the first part, (whether one or more) and *Union Royalty Company, Box 489, Blackwell, Oklahoma,* party of the second part;" (emphasis added). (Ex. 2)

Subsequent to the default judgment, the Taylor interest was conveyed to others and Union, unaware of the default judgment, conveyed its interest to petitioner Alpine Investments, Inc. (Alpine). (Ex. 6; Ex. 7)

Thus, Alpine became the owner based upon a chain of title from the 1926 Taylor conveyance and respondents become the owners based upon a chain of title from the 1947 default judgment reforming the 1926 Taylor conveyance.

Presentation of Federal Issue

Respondents sued to quiet title. Alpine asserted violation of due process by pleading:

> "Alpine Investments, Inc. specifically denies the contents of

numerical paragraph 15 and in connection therewith alleges that the default judgment referred to in Case No. 7289 in the District Court of Roger Mills County, Oklahoma, was invalid and obtained without due process."

The trial court found that the 1926 deed conveyed fee title to Union and that the Trustees of Union were at the time of the 1947 default judgment located in Blackwell, Oklahoma, as the address on the deed indicated. (Finding of Fact 12; Conclusion of Law 13). It also found that the 1947 default judgment was regular on the face of the judgment roll and quieted title in respondents leaving Alpine with no interest in the minerals. (Conclusion of Law 14). The trial court made no direct disposition of the federal question, but the necessary effect of the judgment was to deny the claim.

On appeal, Alpine again asserted the publication notice failed to satisfy due process requirements. (Appellant's Brief in Chief) Alpine's petition in error asserted:

"The trial court erred in confirming that prior judgment in Case No. 7289 in the District Court of Roger Mills County, Oklahoma, wherein the mineral interest of Alpine Investments, Inc. was lost on defective service by publication and without due process of law."

The Oklahoma Supreme Court found that the 1947 default judgment was valid on its face and concluded no inquiry could be made into adequacy of notice other than examination of the face of the judgment because Oklahoma statutes foreclosed further inquiry three (3) years after rendition of the judgment. The Oklahoma Supreme Court made no direct disposition of the federal question presented, but the necessary effect of the opinion was to deny the

claim. When the necessary effect of a judgment is to deny a federal claim, it may be treated as having been denied. *New York ex rel Bryant* v. *Zimmerman*, 278 U.S. 63, 49 S Ct. 61, 73 L Ed. 184 (1928).

By petition for rehearing, Alpine again asserted the denial of due process and claimed its right to challenge the lack of due process could not be extinguished by the three year rule when it had neither knowledge of the denial of due process nor of the running of the three years. The petition for rehearing was denied and finality was accorded the 1947 default judgment.

REASONS FOR GRANTING WRIT

In this case the Oklahoma Supreme Court has necessarily decided a federal question in a way not in accord with the applicable decisions of this Court in that by use of state procedure it upheld the validity of publication notice when actual notice was possible with the exercise of diligence.

In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S Ct. 652, 94 L Ed. 865 (1950) this Court decided notice by publication is sufficient only when, with due diligence, the whereabouts of a person cannot be ascertained.

When the deed sought to be reformed has information to allow actual notice, *Mullane* is not satisfied. The result of this case is to reduce a person's right to notice to a mere requirement that third parties execute and publish certain forms which incant key phrases and then avoid discovery for three years. Good faith and diligent effort is supplanted by mere paper.

When insufficient notice denies the opportunity to be heard, the ensuing silence is not an adequate basis for a state to hinge the closing off of rights. Unless there is a legitimate state interest, plainly asserted federal rights cannot be defeated in the name of local practice. *Davis* v. *Wechsler*, 263 U.S. 22, 44 S Ct. 13, 68 L Ed. 143 (1923); *Henry v. Mississippi*, 379 U.S. 443, 85 S Ct. 564, 13 L Ed.2d 408 (1965).

Although finality of judgments may be a legitimate state interest, when rights are adjudicated upon insufficient notice, finality may not be accorded. Finality may be accorded only after notice reasonably calculated under all circumstances to apprise interested parties and afford them an opportunity for a hearing. *Schroeder* v. *City of New York*, 371 U.S. 208, 83 S Ct. 279, 9 L Ed.2d 255 (1962). The right to notice is fundamental and paramount. This case permits denial of notice and accords finality, using a state rule that relies on the silence naturally flowing from the lack of notice. In such an instance, the interest in finality is not adequate to justify denial of the due process right to notice.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Oklahoma Supreme Court.

Respectfully submitted,

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Of Counsel

October, 1979

APPENDIX

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAY 22, 1979
Ross N. Lillard, Jr., Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Veta Pearl Barton and Sun Oil Company, (Delaware), a corporation,	)	
Appellees,	)	No. 50,720
v.	)	
Alpine Investments Inc., a corporation	)	
Appellant.	)	

APPEAL FROM DISTRICT COURT
OF ROGER MILLS COUNTY, OKLAHOMA

Honorable Charles M. Wilson, Trial Judge

* * * * *

An appeal from a judgment of the trial court refusing to vacate a 1947 default judgment taken on service by publication.

* * * * *

AFFIRMED

Newell E. Wright, Jr., of Perryman,
Smith & Wright
Cheyenne, OK 73628

For Appellee
Veta Pearl Barton

[APPENDIX]

C. Harold Thweatt, of Crowe, Dunlevy, Thweatt,
Swinford, Johnson & Burdick — For Appellee,
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and
Houston and Klein, Inc.
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DOOLIN, J.:

This lawsuit involves a quarter section of land in Roger Mills County, Oklahoma. In the year 1926, the Taylors (owner) conveyed all the mineral rights under this property to Union Royalty Company (Union). In 1931 Union conveyed forty (40) of these 160 mineral acres to Pan Mutual Royalties. Ownership of the remaining 120 mineral acres is the subject of this dispute.

Deraignment of title to the minerals takes two separate directions. The first, through which plaintiff claims title, is as follows. In 1947, owner filed an action in Roger Mills County District Court seeking to reform the 1926 deed to Union from an absolute alienation to a twenty year term and to quiet her title in the minerals. Service by publication was had on an affidavit filed pursuant to 12 O.S. 1941 § 171 and that place of business was unknown pursuant to § 172. Owner took a default judgment against Union, the grantee under the deed. Union received no notice of the action or of the judgment rendered. Soon thereafter owner conveyed the entire quarter section to plaintiff's predecessor in interest reserving no minerals.

In the other deraignment of title, Union apparently unaware of the

1947 default judgment, conveyed its remaining 120 acres by mineral deed to Alpine Investment Company (Alpine), appellant herein.

In the process of mineral leasing by plaintiff, the default judgment was discovered. Production payments to plaintiff were suspended after a lessee learned of Alpine's claim of interest. Alpine refused to acknowledge that the 1947 judgment had any effect on its title. This suit followed.

Plaintiff alleged her title emanated from the patent through the 1947 default judgment. In defence, Alpine sought to vacate the 1947 judgment claiming it was void, and thus subject to collateral attack, because the trustees of Union had no notice of the action or of the judgment against it. It asserts the judgment is void on its face in that service by publication is not proper when a defendant's address or his whereabouts is known. Alpine points to a Blackwell address on the 1926 deed. This address, it claims, is inconsistent with the publication affidavit stating defendant's last known address was unknown.

The trial court found the trustees of Union were indeed in Blackwell at the time of the default judgment; the 1926 deed showed their address on its face. It also concluded the deed conveyed a fee title to Union. It held the 1947 default judgment quieting title in owner was regular and that no defects appeared on the face of the judgment roll; thus it was not void and not subject to Alpine's collateral attack. It quieted title to the disputed 120 mineral acres in plaintiff.[1]. Alpine appeals.

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1. The forty mineral acres conveyed to Pan Mutual Royalties by Union were not affected because Pan Mutual was not a party to the 1947 default judgment. Trial court quieted its title in the 40 acres; no appeal was made.

[APPENDIX]

This proceeding to vacate the 1947 judgment was not instituted within three years as provided for in 12 O.S. 1971 §§ 176, 1031, 1038.[2] Alpine seeks to vacate the judgment under the provision in § 1038 that "(a) void judgment may be vacated at any time, on motion of a party, or any person affected thereby". A judgment is not void in the legal sense for want of jurisdiction unless the lack of jurisdiction appears in the record.[3] We do not deny Alpine's argument that service by publication in itself is not sufficient notice to satisfy due process with respect to persons directly affected by the proceedings whose names and addresses are known or very easily ascertainable.[4] But to create a void decree on these grounds such inadequacy must appear from the face of the judgment roll.

If an affidavit for service by publication does not comply with the requirements of statute, the trial court obtains no jurisdiction over the person of the defendant and the judgment as to him is void.[5] Here the 1947 affidavit for publication service recites the statutory requirements of due diligence and appears regular on its face. The controversy thus centers on whether the presence of Union's address

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2. Cases cited by Alpine wherein a judgment was set aside within the § 176 three year period for opening default judgments on service by publication are not applicable. See Eudaly v. Superior Oil Co., 270 P.2d 335 (Okla. 1954); Johnson v. McDaniel, 569 P.2d 977 (Okla. 1977).

3. Woodley v. McKee, 101 Okla. 120, 223 P. 346 (1924); Farmers' Union Co-Operative Royalty Company v. Woodward 515 P.2d 1381 (Okla. 1973).

4. Mullane v. Central Hanover Bank & Trust Co., 330 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); Schroeder v. City of New York, 317 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962); Ross v. Thompson, 174 Okla. 183, 50 P.2d 385 (1935); Bomford v. Socony Mobil Oil, 440 P.2d 713 (Okla. 1968).

5. Faulkner v. Kirkes, 276 P.2d 264 (Okla. 1954).

on the deed sought to be reformed negates the allegations of due diligence set forth in the affidavit. See *Bomford v. Socony Mobil Oil Co.*, 440 P.2d 713 (Okla. 1968). Could the trial court determine by an inspection of the record, which necessarily must include the deed which is sought to be reformed, that service by publication was improper?[6] We hold trial court was correct in determining that it could not.

Defects, such as anticipated by decisions holding service by publication improper, are those which readily show from an examination of the record without resort to extrinsic evidence. For example in *Farmer's Union Cooperative Royalty Company v. Woodward*, 515 P. 2d 1381 (Okla. 1973) this court held a default judgment was defective on the face of the judgment roll because domestic defendant corporation was served by publication rather than on a registered service agent. The court vacated the judgment as void.

In *Woodley v. McKee*, 101 Okla. 120, 223 P. 346 (1924) a motion to vacate judgment procured on service by publication was filed arguing copies of the publication notice and petition were not mailed to defendant within six days after the first publication although his address was known. Defendant claimed the failure to file an affidavit made the judgment void. This court held the judgment was not void on its face because the trial court

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6. Kolp v. State Commissioners of Land Office, 312 P.2d 483 (Okla. 1957).

affirmatively found the service by publication was legally and duly made.[7]

We believe the principles espoused in *Woodley* are still sound. The affidavit in the 1947 default judgment conformed to the statutes and was valid on its face. The trial court found service by publication was legally and duly made. We will not go behind this finding and consider sufficiency of the evidence of due diligence.

Where service is obtained by publication and the journal entry of judgment recites that publication service is proper, the judgment is not void on its face. Any attack on the ground there was no mailing of copy of petition and publication notice to a last known address must be made within the statutory three years set out at 12 O.S. 1941 § 1038 after rendition of the judgment.[8]

AFFIRMED.

LAVENDER, C.J. and WILLIAMS, HODGES, SIMMS and HARGRAVE, JJ., concur.
IRWIN, V.C.J. and OPALA, J., concur in result.
BARNES, J., dissents.

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7. Although action was brought within statutory time provided for setting aside judgments obtained on service by publication, decision was based on whether judgment was void outside of the statute. C.F. Ross v. Thompson, supra, n. 4.

8. Lowe v. Baskett, 311 P.2d 219 (Okla. 1957). Also see Bomford v. Socony Mobil Oil Co., supra, n. 4. Procedural requirements contained therein were made prospective only.

APPENDIX

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAY 22, 1979
Ross N. Lillard, Jr., Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Veta Pearl Barton	)	
and Sun Oil Company,	)	
a corporation,	)	
Appellees,	)	
	)	
vs.	)	No. 50,720
	)	
Alpine Investments	)	
Inc., a corporation	)	
Appellant.	)	

OPALA, J., concurring in result.

The dispositive question to be answered here is whether the 1947 reformation-of-deed default judgment on publication service alone, entered in Roger Mills County, is void on the face of the record proper [roll] as that term is defined in 12 O.S. 1971 § 704.[1] If our answer be in the affirmative, the judgment was subject to a collateral attack in the suit under review since a facially void judgment may be set aside at any time.[2] In case of our negative answer, appellant [Alpine] no longer can avoid the judgment's binding force as the limitations period had run.[3]

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1. Recodified as 12 O.S.Supp. 1972 §32.1.
2. 12 O.S. 1971 § 1038.
3. Scoufos v. Fuller, Okl., 280 P.2d 720 [1955].

[APPENDIX]

Alpine attributes fatal defect in the judgment roll to the fact that the 1926 deed — the subject-matter of the 1947 reformation suit — bore on both sides of the instrument the mailing address of the defendant therein, Union Royalty Company, a trust, [Union]. This, Alpine asserts, contradicts, on the very face of the judgment roll, the allegations in the non-mailing affidavit to the effect that plaintiff was unable with due diligence to ascertain Union trustees' whereabouts for the purpose of serving them with process. In short, Alpine urges that serving Union [via its trustees] by publication alone was "facially" violative of due process.[4]

Alpine overlooks that the 1926 deed in question was not attached to the petition. Its incorporation into the petition was sought by means of reference to the place [book and page] where it appeared in the county deed records. Before the enactment of 12 O.S. 1971 § 305.1,[5] in 1953, a recorded instrument could not be incorporated into a pleading by means of mere reference and without physical annexation thereto.[6]

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4. Myers v. Purdy, 108 Okl. 147, 234 P.638 [1925]; Ross v. Thompson, 174 Okl. 183, 50 P.2d 385 [1935]; Bomford v. Socony Mobil Oil Co., Okl., 440 P.2d 713 [1968]; see also, Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279 [1962].

5. It is provided by the cited statute as follows: "From and after the passage of this Act in all civil cases whereby it is necessary to incorporate, in the pleadings, facts concerning instruments of record affecting real estate, that such incorporation may be made by reference to the date of such instrument, and the book and page number where recorded in lieu of affixing a copy of the same to such pleadings."

6. Incorporation into a pleading by means other than physical annexation thereto is alien to the common law. Absent to statute, no paper or record can be incorporated into a pleading by mere reference to it. In short, mere reference to an instrument, followed by a statement of its incorporation into a pleading, is not sufficient to make it part of that

Because the 1926 deed in question cannot be considered part of the judgment roll in the 1947 reformation suit, the judgment therein is impervious to a collateral attack.

Since Alpine does not assert that our time limitations on attacking and vacating judgments void in fact but not void facially violate due process — state or federal — that issue need not be reached here.[7]

I concur in result for reasons substantially different from those which form the underpinning for the court's decision.

I am authorized to state that IRWIN, V.C.J. and WILLIAMS, J., concur in these views.

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6. (Continued)
pleading without physically annexing the original or copy. Sidlo, Simmons, Day & Co. v. Phillips, 49 P.2d 243, 244 [Wyo. 1935].

A petition, unless timely challenged by motion, is deemed sufficient even though it does not have conveyances attached thereto. Hurst v. Hannah, 107 Okl. 3, 229 P. 163, 166 [1924]. Neither is absence of such physical attachments fatal to the validity of the judgment roll. Fibikowski v. Fibikowski, 185 Okl. 520, 94 P.2d 921, 926 [1939].

7. The question was raised but not answered in Pascall v. Christie-Stewart, Inc., 414 U.S. 100, 102, 94 S.Ct. 313, 315, 38 L.Ed.2d. 298 [1974]. Nor was it necessary to reach it in Christie-Stewart, Inc. v. Pascall, Okl., 544 P.2d 505, 506 [1976]. For a federal view of how due process may affect state-imposed limitations see Chase Securities Corporation v. Donaldson, 325 U.S. 304, 311, 65 S.Ct. 1137, 1141 [1945].

[APPENDIX]

FILED
SUPREME COURT
STATE OF OKLAHOMA
July 9, 1979
Ross N. Lillard, Jr., Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Veta Pearl Barton and Sun Oil Company, Appellees,	)	
vs.	)	No. 50,720
Alpine Investments Inc., Appellant.	)	

CORRECTION ORDER

It is ordered that the vote shown on the majority opinion and the minority opinion (concurring in result) respectively be corrected as hereinafter shown.

The vote on the majority opinion is corrected to show as follows:

Lavender, C.J. and Williams, Simms and Hargrave, JJ., concur.

Irwin, V.C.J., Hodges and Opala, JJ. concur in result.

Barnes, J., dissents.

The list of names of these Justices concurring in the views of Opala, J., (concurring in result) is: Irwin, V.C.J. and Hodges, J. (As corrected).

Rehearing is denied.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE This 9th day of July, 1979.

CHIEF JUSTICE